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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN KEELER SR.

Appeal 2009-1587
Application 10/691,480
Technology Center 1700

Decided:¹ May 06, 2009

Before CHUNG K. PAK, TERRY J. OWENS, and
BEVERLY A. FRANKLIN, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

The Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the Decided Date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

rejection of claims 3-5, 7, 10, 12, 13, 15 and 18, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

The Invention

The Appellant claims a packaged crabmeat product and a method for making it. Claim 10 is illustrative:

10. A packaged crabmeat product comprising:

a flexible pouch;

a volume of crabmeat placed into said flexible pouch; and

a volume of ambient air within said flexible pouch, said volume of ambient air providing an ambient air to crabmeat ratio within said flexible pouch of about 13-20% by volume such that anaerobic bacterial growth is prevented, wherein said flexible pouch is sealed and pasteurized.

The References

Byrd	2,546,428	Mar. 27, 1951
Walker	3,852,486	Dec. 3, 1974
Sugisawa	4,840,805	Jun. 20, 1989
Doerter	5,268,189	Dec. 7, 1993
Ueyama	2002/0061412 A1	May 23, 2002
Lett	GB 2,343,611 A	May 17, 2000

Nicol et al., "Preserving Fish and Sea Products", *Research Disclosure J.* 23512 (Nov. 1983) (hereafter "L'Air Liquide").

Peterson et al., "Heat-Pasteurization Process for Inactivation of Nonproteolytic Types of *Clostridium botulinum* in Picked Dungeness Crabmeat", 60 *J. Food Protection* 928-34 (1997).

The Rejections

Claims 3-5, 7, 10, 12, 13, 15 and 18 stand rejected under 35 U.S.C. § 103 over 1) Doerter in view of Peterson, Byrd, L'Air Liquide,

and Sugisawa,² 2) Ueyama in view of Peterson, L'Air Liquide, and Sugisawa, 3) Lett in view of Peterson, L'Air Liquide, Doerter, and Sugisawa, and 4) Walker in view of Ueyama and Sugisawa.

OPINION

We affirm the Examiner's rejections.

Issue

Has the Appellant shown reversible error in the Examiner's determination that the applied prior art would have rendered prima facie obvious, to one of ordinary skill in the art, a pasteurized pouch containing ambient air and crabmeat in an ambient air to crabmeat ratio of about 13-20% by volume?

Findings of Fact

Sugisawa discloses a container, which can be a plastic pouch, containing broiled dried fish (col. 1, ll. 7-8, 47-48; col. 3, ll. 63-65; col. 4, ll. 18-20, 31-34). The dried fish "is obtained by the drying treatment of any kind of fish, for example, sardine, horse mackerel, pacific saury, mackerel, salmon, yellowtail, spanish mackerel, herring, eel, conger eel, flatfish, sea bream, or pollack" (col. 1, l. 65 – col. 2, l. 1). "The dried fish or broiled fish may have any form, such as complete fish (including an eviscerated fish) or a slice obtained by cutting the fish in a suitable manner (half fish or fish fillet)" (col. 2, ll. 46-49). Sugisawa teaches (col. 3, ll. 3-16):

When the broiled fish is to be hermetically packaged in the container, the broiled fish is placed in the container which is then sealed at suitable positions by heat sealing or adhesion. It is preferable that the broiled fish be packaged in the container under

² Our consideration of Peterson and L'Air Liquide is based upon the full Peterson and L'Air Liquide documents in the application file.

vacuum from the viewpoint of improving the sterilization effect during the heat sterilization. It is particularly preferable to conduct vacuum packaging so that the air content is 25% or less, preferably 15% or less, relative to total volume of air and the broiled fish in the container, because the sterilization effect obtained during the heat sterilization is improved, and the effect of preventing the flow of drips from the fish and the breaking of the fish meat during the heat sterilization is also improved.

Sugisawa sterilizes the broiled fish at 75-130°C for about 5 to 60 minutes (col. 3, ll. 24-31).

Lett pasteurizes crabs at 80-100°C for 90 ± 5 minutes (p. 4, ll. 8-11).

Peterson pasteurizes crabs for times ranging from 20.3 min. at 94.4°C to 90 min. at 88.9°C, and teaches that pasteurization extends refrigerated shelf life by inactivating spores of *Clostridium botulinum* nonproteolytic types B, E, and F and non-spore-forming pathogens such as *Listeria monocytogenes*, but does not inactivate heat-resistant proteolytic strains of *Clostridium botulinum* or other more heat-resistant spore formers (abstract).

L'Air Liquide teaches that packaging whole fish and fresh sea products under gaseous atmospheres rich in carbon dioxide and containing an amount of oxygen such as 20 vol.% inhibits, due to the carbon dioxide, the growth of many germs and avoids, due to the oxygen, the development of strict anaerobic flora, particularly *Clostridium botulinum* (p. 23512).

Ueyama sterilizes both crabs and other marine products (¶¶ 0039, 0066).

Doerter (col. 2, ll. 23-24), Byrd (col. 1, ll. 7-8) and Walker (col. 2, ll. 44-45) teach that crabs are shellfish.

Analysis

The Appellant argues that Sugisawa's disclosure of vacuum packaging at an air content of 25% or less, preferably 15% or less (col. 3, ll. 10-11), "suggests only that Sugisawa et al.'s patent attorney did not want to limit the invention to a true vacuum – not that some amount of air is advantageous" (Br. 12).

That argument is not persuasive because it is unsupported by evidence. Arguments of counsel cannot take the place of evidence. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *In re Payne*, 606 F.2d 303, 315 (CCPA 1979); *In re Greenfield*, 571 F.2d 1185, 1189 (CCPA 1978); *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Although Sugisawa does not disclose that the presence of some amount of air is advantageous relative to a vacuum, Sugisawa discloses that the benefit of improving sterilization effects is obtained at an air content as high as 25 vol.% (col. 3, ll. 9-14).

The Appellant argues that Sugisawa discloses packing broiled dried fish, not crabmeat (Br. 12).

Sugisawa teaches that the fish can be any kind of fish (col. 1, ll. 65-66). As indicated by Doerter (col. 2, ll. 23-24), Byrd (col. 1, ll. 7-8) and Walker (col. 2, ll. 44-45), crabs are shellfish. Also, the record indicates that the problem of aerobic and anaerobic spore growth is a characteristic of both crabs and non-shell fish. For example, L'Air Liquide packages whole fish and fresh sea products in an atmosphere containing an amount of oxygen such as 20 vol.% to avoid the development of strict anaerobic flora, particularly *Clostridium botulinum* (p. 23512), and Ueyama sterilizes both crabs and other marine products (¶¶ 0039, 0066). Also, Peterson teaches

that pasteurizing crabs extends refrigerated shelf life by inactivating spores of *Clostridium botulinum* nonproteolytic types B, E and F and non-spore-forming pathogens such as *Listeria monocytogens* (abstract). Hence, the record indicates that one of ordinary skill in the art, through no more than ordinary creativity, would have applied Sugisawa's disclosure to crabmeat. See *KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (In making an obviousness determination one "can take account of the inferences and creative steps that a person of ordinary skill in the art would employ").

The Appellant argues that Sugisawa discloses heat sterilization, not pasteurization (Br. 13).

As indicated by the similarity of Sugisawa's sterilization conditions (75-130°C for about 5 to 60 minutes (col. 3, ll. 24-31)) and the pasteurization conditions of Lett (80-100°C for 90 ± 5 minutes (p. 4, ll. 8-11)) and Peterson (20.3 min. at 94.4°C to 90 min. at 88.9°C (abstract)), one of ordinary skill in the art would have expected pasteurization to provide an effect similar to Sugisawa's sterilization. Hence, one of ordinary skill in the art, through no more than ordinary creativity, would have used pasteurization as an alternative to Sugisawa's sterilization. See *KSR*, 550 U.S. at 418.

The Appellant argues that Sugisawa "fails to teach an ambient air to crabmeat ratio within a range of about 13 to 20 percent by volume" (Br. 14).

Sugisawa's range of less than 25 vol.% air (33% or less air:fish ratio) (col. 3, ll. 10-11) encompasses the Appellant's range and, therefore, would have rendered the Appellant's air contents prima facie obvious to one of ordinary skill in the art. Sugisawa's preferred range of less than 15 vol.% air (18% or less air:fish ratio) (col. 3, l. 11) overlaps the Appellant's range. Use

of amounts within the overlapping range would have been prima facie obvious to one of ordinary skill in the art. See *In re Malagari*, 499 F.2d 1297, 1303 (CCPA 1974).

The Appellant argues that Sugisawa “does not disclose that a certain minimum amount of air in the package can be advantageous” (Reply Br. 4).

For a prima facie case of obviousness to be established, the applied prior art need not recognize a particular advantage recognized by the Appellant. See *Ex parte Obiaya*, 227 USPQ 58, 60 (BPAI 1985) (“The fact that appellant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious”). Moreover, L’Air Liquide would have indicated to one of ordinary skill in the art that Sugisawa’s air provides the Appellant’s recognized benefit of avoiding development of anaerobic spores (Appellant’s Spec. ¶ 10; L’Air Liquide p. 23512).

The Appellant argues that one of ordinary skill in the art would not reasonably have expected that combining the references would produce the claimed invention (Br. 14-15).

That reasonable expectation would have been provided by the references as discussed above.

The Appellant argues that the Appellant’s invention produces unexpected results (Br. 15).

That argument is not well taken because the Appellants have not provided a side-by-side comparison of the claimed invention with the closest prior art which is commensurate in scope with the claims, and explained why the results would have been unexpected by one of ordinary skill in the

art. See *In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991); *In re De Blauwe*, 736 F.2d at 705; *In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983); *In re Clemens*, 622 F.2d 1029, 1035 (CCPA 1980); *In re Freeman*, 474 F.2d 1318, 1324 (CCPA 1973); *In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). The attorney argument provided by the Appellant cannot take the place of evidence. See *De Blauwe*, 736 F.2d at 705; *Payne*, 606 F.2d at 315; *Greenfield*, 571 F.2d at 1189; *Pearson*, 494 F.2d at 1405.

Conclusion of Law

The Appellant has not shown reversible error in the Examiner's determination that the applied prior art would have rendered prima facie obvious, to one of ordinary skill in the art, a pasteurized pouch containing ambient air and crabmeat in an ambient air to crabmeat ratio of about 13-20% by volume.

DECISION/ORDER

The rejections of claims 3-5, 7, 10, 12, 13, 15 and 18 under 35 U.S.C. § 103 over 1) Doerter in view of Peterson, Byrd, L'Air Liquide and Sugisawa, 2) Ueyama in view of Peterson, L'Air Liquide and Sugisawa, 3) Lett in view of Peterson, L'Air Liquide, Doerter and Sugisawa, and 4) Walker in view of Ueyama and Sugisawa are affirmed.

It is ordered that the Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Appeal 2009-1587
Application 10/691,480

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